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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALAMO BANK OF TEXAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FINANCIAL INSTITUTIONS TRADE ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether Congress, in the Bank Merger Act, intended to impose flow-through criminal liability on a surviving state bank for pre-merger crimes committed by a national bank that disappeared in a merger of the two banks.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
I. Whether The Bank Merger Act Imposes Flow-Through Criminal Liability On A Surviving Bank For Pre-merger Crimes Committed By Another Bank Is An Important And Unsettled Question Of Federal Law Which Should Be Decided By This Court	3
II. The Fifth Circuit Misapplied This Court's Decision In *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959), Which In Any Event After Thirty Years Should Be Revisited In Light Of The Enormous Changes That Have Occurred In Corporate And Banking Law.	6
A. The Melrose Analysis	7
B. The Fifth Circuit's Application of Melrose	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Browning Ferris Industries v. Kelco Disposal, Inc. 109 S. Ct. 2909 (1989)	12
Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489 (1982)	10
Melrose Distillers, Inc. v. United States, 359 U.S. 271 (1959)	*passim*
Oklahoma Natural Gas Company v. Oklahoma, 273 U.S. 257 (1927)	10
Shaw v. North Pennsylvania R.R. Co., 101 U.S. 557 (1879)	10
United States v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir. 1989)	6,11-12
United States v. Monsanto, 109 S. Ct. 2657 (1989)	11
STATUTES:	
Pub. L. 101-73, Title IX	4
Pub. L. 101-73, § 221(2)	2
12 U.S.C. § 92	9
12 U.S.C. § 214b	3,8-9
12 U.S.C. § 222	9
12 U.S.C. § 321	9
15 U.S.C. §§ 1, 2	8
21 U.S.C. § 853	10
31 U.S.C. § 5322(a) and (b)	8
42 U.S.C. § 9601-9657	10
42 U.S.C. § 9607(b)	10

Table of Authorities Continued

Page

LEGISLATIVE MATERIAL:

Testimony of James J. McDermott, Jr., Executive Vice President, Keefe, Bruyette & Woods, Inc., before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 101st Sess., Oct. 5, 1989 (to be published as "Oversight Hearing on the Condition of the Banking System") 5

S. Rep. No. 1104, 81st Cong. 2d Sess., *reprinted in* 1950 U.S. Code Cong. and Admin. News 3012 9

MISCELLANEOUS:

Board of Governors of the Federal Reserve System, 75th Annual Report 232 (1988) 5

I. M. Malloy, *The Corporate Law of Banks* (1988) 7

Note, *Corporate Life After Death: CERCLA Preemption of State Corporation Dissolution Law*, 88 Mich. L. Rev. 131 (1989) 10

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BRIEF OF FINANCIAL INSTITUTIONS TRADE ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF THE PETITION

In accordance with the provisions of Rule 36 of the Supreme Court Rules, the American Bankers Association, The National Council of Savings Institutions, Independent Bankers Association of America, Texas Bankers Association, and Independent Bankers Association of Texas hereby respectfully submit this Brief as Amici Curiae in support of the Petition for Writ of Certiorari filed by Alamo Bank of Texas in the above entitled case. Both Petitioner and Respondent have consented to this filing, and their written consents are filed with this Brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States. It has members in each of the fifty states and the District of Columbia, and its members hold approximately ninety-five percent of the domestic assets of the American banking industry.

The National Council of Savings Institutions represents an important segment of the thrift industry, well-capitalized savings banks and savings and loan associations. Its 500 members hold in excess of $50 billion in assets or approximately thirty-five percent of the industry's total assets. The Bank Merger Act was recently made applicable to thrift institutions. *See* Pub. L. 101-73, § 221(2) (August 9, 1989).

The Independent Bankers Association of America is a national trade association representing approximately 6,300 community banks in forty-nine states and the District of Columbia.

The Texas Bankers Association is the principal trade association of the commercial banking industry in Texas, having as members about 1,350 of the 1,500 banks in that state, including both state and nationally chartered banks.

Independent Bankers Association of Texas is a banking trade association representing community independent banks domiciled in Texas. It represents approximately 900 banks.

The amici have a manifest interest in the sound regulation of the financial services industry, and believe that neither law nor legitimate regulatory policy supports the result reached by the Fifth Circuit in

this case. The imposition of criminal sanctions on an innocent institution for violations of the Bank Secrecy Act committed by an institution merged into the innocent institution after the violations were committed, but before indictment, simply is wrong. The interests of the industry, its customers, and its regulators are plainly implicated, moreover, because innocent shareholders, depositors, borrowers, federal deposit insurance agencies and taxpayers ultimately bear the cost of severe penalties like those imposed on the innocent bank in this case.

STATEMENT OF THE CASE

The amici curiae adopt Alamo Bank's Statement of the Case.

REASONS FOR GRANTING THE WRIT

I

Whether The Bank Merger Act Imposes Flow-through Criminal Liability On A Surviving Bank For Pre-merger Crimes Committed By Another Bank Is An Important And Unsettled Question Of Federal Law Which Should Be Decided By This Court.

The decision of the Fifth Circuit in this case is the first time any federal court has decided that the federal Bank Merger Act (12 U.S.C. § 214b) "saves" a criminal prosecution against an otherwise deceased national bank, within the meaning of the Court's decision in *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272 (1959). Indeed, to our knowledge, this is also the first time a federal court has held that *any* federal civil statute "saves" a prosecution under a federal criminal statute against any deceased corporation. Moreover, nothing in the lower court's opin-

ion limits successor criminal liability to Bank Secrecy Act violations, and a ruling imposing such liability here might well be extended to numerous other criminal offenses, whose penalties and statutes of limitation were recently greatly increased by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Pub. L. 101-73, Title IX) ("FIRREA"). If allowed to stand, this decision will open the doors to prosecution and punishment of those who have committed no crimes. Not only is this fundamentally unjust, but the public policy consequences for financial institutions are so devastating and so important as to warrant review by this Court. Even the mere threat of criminal sanctions is likely to deter legitimate acquisitions rather than deter criminal acts.

In its Petition for a Writ of Certiorari at pp. 5-9, the Petitioner has discussed the effects of the decision below on the Federal Deposit Insurance Corporation ("FDIC") efforts to resolve the massive problems caused by failed banks and thrifts. Petitioner's discussion would also pertain to the Resolution Trust Corporation ("RTC") newly created by Title V of FIRREA and whose mandate is to resolve insolvent savings associations. The establishment of flow-through liability would deter healthy banks from acquiring a failed bank or thrift. As Petitioner has demonstrated, acquisition of a failed bank or thrift by a healthy institution is the most efficient and least costly means for FDIC and RTC to dispose of a failed institution. Therefore, any action which discourages acquisition of failed institutions by healthy ones increases the drain on FDIC's insurance funds and the RTC Resolution Fund, and ultimately must be borne by the taxpayers.

Amici wholly concur in this argument and here carry the analysis a step further.

The imposition of flow-through criminal liability on an acquiring bank for crimes committed by the bank it acquired would also deter acquisitions and mergers of healthy financial institutions. Although the matter of failing institutions is of critical current importance, consolidation through acquisition and merger of healthy institutions is a significant trend in the financial services industry as well.[1] During calendar year 1988, 598 banks were converted into branches through mergers and acquisitions (as Central was in this case), far exceeding in number the two hundred banks that failed in 1988.[2]

Since the result below, under the Fifth Circuit's reasoning, is compelled by a federal statute, there appears to be no means by which a financial institution could prevent successor criminal liability by contract or otherwise.

If a bank considering a merger or acquisition faces exposure to criminal liability for acts of the acquired institution and the collateral consequences to it under state and federal law of a criminal conviction, it will be deterred from making the acquisition. It is also unlikely that a "due diligence" investigation would reveal such past criminal acts. In the instant case,

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[1] Testimony of James J. McDermott, Jr., Executive Vice President, Keefe, Bruyette & Woods, Inc., before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 101st Cong., 1st Sess., Oct. 5, 1989 (to be published as "Oversight Hearing on the Condition of the Banking System").

[2] Board of Governors of the Federal Reserve System, 75th Annual Report 232 (1988).

for example, the offenses occurred over three years before the merger.

As Petitioner has cogently argued, nothing in the Bank Secrecy Act, which Act the court below wholly ignored, supports the imposition of criminal penalties on the surviving bank in a merger. Your amici are not apologists for financial institutions which fail to carry out their legal obligations under the Bank Secrecy Act to report large cash transactions to the Department of the Treasury. People and organizations who violate the criminal laws of the United States should be punished for their misdeeds. We appear here only to emphasize the converse: People and organizations who do not violate the laws ought not to be punished. To punish the innocent serves no good public policy, and unnecessarily detracts from other important national objectives.

II

The Fifth Circuit Misapplied This Court's Decision In *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959), Which In Any Event After Thirty Years Should Be Revisited In Light Of The Enormous Changes That Have Occurred In Corporate And Banking Law

The Fifth Circuit cites *Melrose Distillers, Inc. v. United States* as the single precedent for its conclusion that there can be "flow-through" criminal liability in this case, *United States v. Alamo Bank of Texas*, 880 F.2d 828, 830 (5th Cir. 1989). We agree with the lower court that *Melrose Distillers* is the controlling precedent. However, the court below failed to perform the analysis that *Melrose* requires. Instead, it picks out from the *Melrose* opinion language which was dicta when written, which was effectively dis-

claimed by this Court only last term, and would not, in any case, justify the breadth of the Fifth Circuit's ruling. In any event, this Court should revisit *Melrose* and successor criminal liability in light of the dramatic changes in corporate and banking law.[3]

A. The Melrose Analysis

In *Melrose*, this Court noted that "in the federal domain, prosecutions abate both on the death of an individual defendant . . . and on the dissolution of a corporate defendant . . . unless the action is saved by statute." 359 U.S. at 272 (citations omitted).

There were three critical factors relied upon by the Court in *Melrose* which moved this court to find flow-through liability:

1. The corporations charged with crimes were dissolved *after* the indictment was returned.
2. There was a statutory scheme which made "it clear that petitioners did not escape criminal responsibility. . . ." *Melrose*, 359 U.S. at 272.
3. The corporations dissolved in *Melrose* became divisions of a new corporation.

None of these factors is present here. The bank merger in this case occurred on April 1, 1987, the date on which Central National Bank surrendered its charter and ceased to exist. The indictment was not returned until December 17, 1987. There is nothing in the record to suggest that this merger was an artifice to avoid criminal liability. The post-indictment

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[3] "This has been a period of great change and challenge in the corporate law of depository institutions." I. M. Malloy, *The Corporate Law of Banks* (1988), at xviii.

dissolutions and reincorporation in *Melrose*, followed by a motion to dismiss because of the dissolution, suggested that the corporate reorganization in *Melrose* was a sham transaction entered into in an attempt to avoid prosecution.

The federal statute relied on in *Melrose*, 15 U.S.C. §§ 1, 2 specifically defined a person liable to prosecution thereunder to include corporations which existed under state law.[4] The two states whose laws were at issue in *Melrose*, Delaware and Maryland, had statutes which this Court interpreted as providing that the corporations involved "existed" at the time they were charged with, and convicted of, the relevant crimes. The statute alleged to "save" the prosecution in this case, the Bank Merger Act, is not in any way comparable to the state statutes at issue in *Melrose*. The Maryland law specifically provided that a corporate dissolution did not "abate any pending suit or proceeding" and the Delaware statute specifically kept alive "proceedings" against dissolved corporations for three years. *Melrose*, 359 U.S. at 273.

Here, by contrast, the Bank Merger Act provides that surrender of the charter terminates the franchise. The Act is totally silent as to abatement of proceedings against dissolved national banks. It provides that "the resulting State bank shall be considered the same business and corporate entity as the national banking association although as to rights,

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[4] Here, the criminal statute in question, the Bank Secrecy Act, imposes liability upon a "person willfully violating this subchapter" 31 U.S.C. §§ 5322(a) and (b). It does not, by its own terms, impose liability upon the heirs or next of kin of a person willfully violating the law.

powers and duties the resulting bank is a State bank." 12 U.S.C. § 214b. The legislative history of the Bank Merger Act is quite clear as to its limited intent. The purpose of the statute was to equalize the tax treatment of bank mergers between cases in which the surviving bank was a national bank and those in which the surviving bank was a state bank. *See* S. Rep. No. 1104, 81st Cong. 2d Sess., *reprinted in* 1950 U.S. Code Cong. and Admin. News 3012, 3013.

Self-evidently, the state bank cannot be considered the same as the national bank for *all* purposes, for that would result in serious anomalies in the law. For example, a national bank is automatically a member of the Federal Reserve System, 12 U.S.C. § 222; but a state bank is given a choice. It may or may not choose to be a member of the Federal Reserve System. 12 U.S.C. § 321. But if the state bank is considered the same as the national bank for all purposes, then the surviving state bank in a merger must, of necessity, be a member of the Federal Reserve—thus depriving the state bank of the option the law gives it. Similarly, a national bank located in a small town has the explicit statutory power to engage in the insurance business. 12 U.S.C. § 92. A state bank in a small town in Texas has no such right under the state law. But if the state bank is considered the same as the national bank for all purposes after a merger, then the surviving state bank in a small town would have the opportunity to sell insurance, even though state law does not permit it.

The lower court has interpreted the words of the Bank Merger Act, "same business and corporate entity" so as to make a criminal of a bank which committed no crime. As such, the bank is entitled to fair

notice of that possibility. *Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489 (1982). In addition to that, it is a rule of statutory construction that statutes in derogation of the common law are to be strictly construed against changes in the common law. *Shaw v. North Pennsylvania R.R. Co.*, 101 U.S. 557, 565 (1879). As we have demonstrated, the common law rule is that a criminal prosecution abates upon the death of a natural person defendant or the dissolution of a corporation. *See, e.g., Oklahoma Natural Gas Company v. Oklahoma*, 273 U.S. 257, 259 (1927).

When Congress intends to provide for successor liability, it knows how to do so. An example of such a statutory exception is the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), which confers strict liability upon certain successors in interest (called "Potentially Responsible Parties" ("PRP")) for the costs of cleaning up sites where hazardous materials are released into the environment.[5] This statute specifically sets forth the only conditions under which a PRP is liable for such clean up costs, 42 U.S.C. § 9607(b).

In addition, where Congress intends that the penalty for commission of a crime be extracted from a third party who has come into possession of the assets of the criminal, it knows how to do that specifically as well. An example is the Comprehensive Forfeitures Act of 1984, 21 U.S.C. § 853, in which Congress im-

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[5] For a comprehensive discussion of the imposition of liability upon dissolved corporations under this statute, *see* Note, *Corporate Life After Death: CERCLA Preemption of State Corporation Dissolution Law*, 88 Mich. L. Rev. 131 (1989).

posed forfeitures upon assets of some criminals, when those assets are used in the commission of or derived from the crimes in question. Such assets are subject to forfeiture as of the time of the commission of the act, so any person taking those assets with knowledge that they might be subject to forfeiture is on fair notice. *See United States v. Monsanto*, 109 S. Ct. 2657 (1989). The Comprehensive Forfeitures Act is limited in scope and provides a number of affirmative defenses to innocent third parties. Here, by contrast, the civil statute, the Bank Merger Act, has no limits and has no affirmative defenses for innocent third parties. If it had been intended that the Act would impose liability on third parties, such factors would undoubtedly have been included in the law.

Finally, in *Melrose*, this Court noted that the dissolved corporations continued to exist as divisions of a new corporation and that there was no reason to allow them to escape criminal penalties. Essentially, this Court found in *Melrose* that the same legal persons who committed crimes continued to exist, despite sham dissolutions, and could be punished for their crimes. Here, by contrast, Central National Bank has ceased to exist, and Alamo Bank should not be punished in its stead. There is no evidence of a sham transaction. Quite the contrary, it is clear that the dissolution of Central as an independent business entity took place in order to take advantage of a change in state branch banking laws, not to avoid prosecution. (*See* Pet. for Writ. of Cert. at 3, n. 1).

B. The Fifth Circuit's Application of *Melrose*

The Fifth Circuit quotes Justice Douglas' opinion in the *Melrose* case as follows:

> After dissolution [the dissolved corporations] simply became divisions of a new corporation under the same ultimate ownership. In this situation, there is no more reason for allowing them to escape criminal penalties than damages in civil suits. As the Court of Appeals noted, a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money.

880 F.2d at 830 quoting *Melrose* at 274.

Significantly, the court below omits a sentence which precedes this quotation. Mr. Justice Douglas made it eminently clear that the quotation was dicta when he wrote that "*Policy* reasons look to the same result." *Melrose* at 274 (emphasis added). In addition, in the cited paragraph, Justice Douglas equated criminal fines and civil damages in the context of corporations because a corporation cannot go to jail. If there is *no* difference between criminal fines and civil damages, then the Eighth Amendment prohibition against excessive fines would likewise protect defendants against excessive civil damages. We know that that is not true because the Court so held last June in *Browning Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989). There, the Court concluded that there is a clear distinction between the two in law and in fact. There are constitutional limits upon the government which do not apply to private parties.

Finally, even if Justice Douglas were correct in his reasoning that it is acceptable to punish one corporation for the misdeeds of another, so long as the same ultimate owners pay the price of the crime, the Fifth Circuit here has not followed that limitation.

The scope of the Fifth Circuit's decision is far broader than would be allowed even by the dicta in the *Melrose* case, because there is no indication that the result would be different in the case of two merging banks which had absolutely no prior affiliation.[6] In the court below, the U.S. Attorney argued that "the issue of flow through liability does not turn on who owned the pre-merger banks or the resulting banks" (Fifth Circuit Brief of the United States at 3, n. 1). In affirming the conviction of Alamo for Central's crimes, the Fifth Circuit apparently agreed, placing no limits upon its conclusion that, under the Bank Merger Act as construed by the court, "Alamo is CNB and it is CNB now named Alamo which is responsible for CNB's actions and liabilities." 880 F.2d at 830.

In any event, if this Court is inclined to give *Melrose* the reading that is the most generous to the government (which it should not do, for the reasons indicated above), it should grant the Petition for Writ of Certiorari, and either narrow the Fifth Circuit's decision or vacate that decision and remand it to the Fifth Circuit with instructions.

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[6] Alamo and Central were subsidiaries of the same holding company, Alamo Corporation of Texas. (*See* Pet. for Writ of Cert. at 3, n. 1).

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, your amici, on behalf of their member financial institutions, hereby respectfully urge the Court to grant the aforementioned Petition.

Respectfully submitted,

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